No. 491

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IN THE

Supreme Court of the United States

TERM.....

WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

versus

ESTEVE BROTHERS & COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT OF SAME.

SPENCER, FENNER, GIDIERE & PHELPS,
RUSH TAGGART,
FRANCIS RAYMOND STARK,
JOSEPH L. EGAN,
Attorneys for Petitioner.

HAUSER PRINTING CO., "The Legal Printers," 720 Poydras St., N. O., La.

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WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

versus

ESTEVE BROTHERS & COMPANY,
Respondent.

To the Honorable the Supreme Court of the United States:

Your petitioner, Western Union Telegraph Company, respectfully petitions this Court that a writ of *certiorari* may be granted directing the Circuit Court of Appeals for the Fifth Circuit to certify to this Honorable Court for its review and determination the case of Western Union Telegraph Company, plaintiff in error, versus Esteve Brothers & Company, defendant in error, and for reasons therefor respectfully shows to this Honorable Court as follows:

THE VITAL QUESTION INVOLVED IN THIS APPLICATION IS THIS: ARE THE STIPULATIONS LIMITING LIABILITY FOR INTERSTATE AND FOREIGN TELEGRAMS, WHICH HAVE BEEN DULY ESTABLISHED BY TELEGRAPH COMPANIES IN PURSUANCE OF THE PERMISSION GRANTED BY THE ACT TO REGULATE COMMERCE, AND FILED WITH AND APPROVED BY THE INTERSTATE COMMERCE COMMISSION, APPLICABLE TO ALL TELEGRAMS ALIKE, OR ONLY TO SUCH TELEGRAMS AS ARE WRITTEN ON THE ORDINARY MESSAGE BLANKS IN WHICH THESE CONDITIONS ARE SET FORTH? IN OTHER WORDS, DOES THE SENDER OF THE MESSAGE WHO WRITES IT ON PLAIN PAPER, OR TELEPHONES IT TO THE TELEGRAPH OFFICE, SECURE A HIGHER MEASURE OF LIABILITY, IN EXCHANGE FOR THE SAME RATE, THAN HIS COMPETITOR WHO WRITES A SIMILAR MESSAGE ON THE USUAL SENDING BLANK?

FIRST. Respondent, a partnership composed of residents of Spain and of a resident of Savannah, Georgia, instituted suit in the Civil District Court for the Parish of Orleans, State of Louisiana, against petitioner, a corporation organized under the laws of the State of New York, to recover the sum of Thirty-one Thousand, Seven Hundred Twenty-five Dollars ($31,725) as damages sustained by it by reason of an error in the transmission of a cablegram from Barcelona, Spain, to New Orleans, Louisiana. On proper petition and bond, petitioner removed its case from the State Court to the United States District Court for the Eastern District of Louisiana, on February 28, 1918. The petition for removal was based entirely on the ground of diversity of citizenship (Tr. p. 8). Thereafter, petitioner

filed an answer, in which it "*inter alia*" specially averred that its liability was restricted to the proportion of the tolls paid by respondent for the transmission of the message sued on which accrued to petitioner, or the sum of Four and 65-100 dollars ($4.65), for the reason that said message was an unrepeated message, and that under the rules, regulations and tariffs filed by it with the Interstate Commerce Commission under the Act of Congress of June 18, 1910, its liability for errors in unrepeated messages was restricted to the price received by it for transmitting such messages (Tr. pp. 16 to 18). The case was tried before a jury upon an agreed statement of facts. The motion of respondent for the direction of a verdict for the full amount of the loss shown by said statement of fact, to-wit, the sum of Thirty-one Thousand and Ninety Five Dollars, was granted by the Court, and the motion of petitioner to direct a verdict for Four and 65-100 Dollars, the proportion of the amount received by it for the transmission of the message, was denied. Petitioner's motion was based upon the following grounds:

> "That to hold defendant liable in this case beyond the amount of the liability provided for in its established classifications and tariffs filed with the Interstate Commerce Commission, to-wit: The amount of the proportion of the tolls accruing to the defendant, or the sum of Four and 65-100 dollars, with interest from the date of the message, would be in contravention of Article 1, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and of the Act of Congress approved June 18, 1910," (Tr. p. 23).

Exceptions were duly taken to the granting of respondent's request for a direction of a verdict and the refusal of petitioner's request, and the jury then brought in a verdict for Thirty-one Thousand and Ninety-five Dollars ($31,095), (Tr. p. 40), and judgment was rendered on February 12, 1920, for that amount (Tr. p. 41). From this judgment petitioner prosecuted a writ of error to the Circuit Court of Appeals of the United States for the Fifth Circuit, and the said Circuit Court of Appeals on May 26, 1920, affirmed the judgment of the District Court.

SECOND. Your petitioner avers that the material facts in this case, as shown by the agreed statement of facts, (Tr. pp. 11 to 19), are as follows:

On September 13, 1917, respondent deposited in the office of the Telegraph Administration of the Spanish Government, at Barcelona, Spain, a cablegram addressed to its branch at New Orleans, Louisiana, directing the sale of Two Hundred (200) bales of cotton futures. The message was correctly transmitted from Barcelona, Spain, to Paris, France, where it was delivered to the telegraph lines of the French Government, which in turn transmitted it correctly and delivered it to petitioner's cable system at Havre, France, over which it was transmitted correctly to New York City, where it was turned over to petitioner's land line system for transmission between New York City and New Orleans, Louisiana. In the course of transmission between New York and New Orleans the word "hundred" was changed to "thousand," and respondent's New Orleans office accordingly sold two thousand bales of cotton futures. Immediately upon discovery of the mistake, respondent closed out the transaction at a loss of Thirty-one Thousand and Ninety-five Dollars ($31,095) due directly to the error in transmission.

In the month of May 1916, petitioner, acting under authority of its executive committee, filed with the Interstate Comerce Commission its classification of land line and cable messages and filing forms of such messages together with the conditions under which the various classes of land line and cable messages are handled and its tariffs and schedules, and all of said documents have been ever since on file with the Interstate Commerce Commission. Said form of cable message contains the following provisions, (Tr. p. 36):

> "All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a cable message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-quarter of the unrepeated cable message rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated cable message, and paid for as such. It is agreed between the sender of the following message and this company that this company shall not be liable for mistakes or delays in transmission or delivery of any unrepeated message beyond the amount of that portion of the tolls which shall accrue to this company."

Said form of land line message contained the following provisions, (Tr. p. 31):

> "All telegrams taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a telegram should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated telegram, and paid for as such. In considera-

tion whereof it is agreed between the sender and the telegraph company as follows:

"1. The company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated telegram beyond the amount received for sending the same."

No request was made by respondent for the repetition of said message. The amount paid by respondent for the transmission of said message was the amount specified in the tariff then on file with the Interstate Commerce Commission for the transmission without repetition of a message containing the number of words contained in the message sued on from Barcelona, Spain, to New Orleans, Louisiana. This rate was not a joint rate, but the sum of the local rates of each of the three connecting systems over which the message passed. Had respondent requested the repetition of said message, it would have been required to pay an additional amount for that portion of the route represented by defendant's lines. None of petitioner's aforesaid forms or blanks were used at any time in the receiving or transmission of said message.

THIRD. Your petitioner contends that under the Interstate Act, as amended by the Act of June 18, 1910, the rates, rules and regulations of telegraph and cable companies adopted in conformity with that Act have the same binding force and effect upon these companies and upon the public as the rates, rules and regulations contained in the tariffs filed with the Interstate Commerce Commission by common carriers by railroad; that petitioner was specifically authorized by the Act of 1910 to classify its messages into repeated and unrepeated messages, and to charge different rates therefor (Section 1); that the limitation for liability for error in transmission to the price of the message has always been recognized as a fundamental condition appertaining to

unrepeated messages; that this limitation was held valid by this Court more than a quarter of a century ago (*Primrose vs. Western Union*, 154 U. S., p. 1); that the unrepeated message rate has been recognized by this Court and by the Interstate Commerce Commission as the "basic" or "primary" rate; (*Primrose vs. Western Union, supra; Clay County Produce Co. vs. Western Union*, 44 I .C. C., 670); and that any person sending a telegram between the states of this country or from a foreign country to this country without making a request for its repetition, is limited in his recovery for damage caused by an error in transmission to the price of the message.

We submit that the refusal of the Circuit Court of Appeals to restrict recovery in this case to the price of the message is in the very teeth of the Interstate Commerce Act and of the decisions of this Court interpreting it. This Court has repeatedly declared that the public are bound by the rates, including limitations of liability which are an essential part thereof, regardless of knowledge, assent or even misrepresentation. (*Gulf, Colorado & Santa Fe Railway vs. Hefley*, 158 U. S., 98; *Texas & Pacific Railway Co. vs. Mugg*, 202 U. S., 242; *Boston & Maine Railroad vs. Hooker*, 233 U. S., 97; *Louisville & Nashville R. R. Co. vs. Maxwell*, 237 U. S., 94.) In the *Hooker case* it was held that a provision in the tariff of a railroad company limiting baggage liability to $100 was binding upon a passenger who had no knowledge thereof and had not assented thereto.

The Circuit Court of Appeals attempted to distinguish these cases, particularly the *Hooker case*, on the ground that under the Interstate Commerce Act, telegraph and cable companies were not required, as are common carriers by railroad, to file their tariffs with the Interstate Commerce

Commission. This distinction is, we submit, unsound. It is true that Section 6 of the Act, which relates to the filing of tariffs, was not amended by the Act of 1910 so as to embrace telegraph and cable companies. That Section, however, relates merely to procedure. The fundamental requirements of the Act are that all charges shall be just and reasonable, and that no discrimination shall be practiced. These provisions are contained in Sections 1 and 3 of the Act. These Sections were amended by the Act of 1910 so as to apply to telegraph and cable companies. The line of decisions cited above was based entirely upon the necessity of maintaining the integrity of these two Sections so that "the purpose of the Act to have but one rate, open to all alike and from which there could be no departure," (*Boston & Maine R. R. vs. Hooker, supra*, p. 112), might be accomplished. The fact that the Act does not require telegraph or cable companies to file their tariffs with the Commission does not make the rates initiated by them any less lawful or binding than those filed with the Commission by common carriers by railroad. The Act has merely provided different methods for the establishment of rates by transportation companies and by telegraph and cable companies. The rates of both are subject to the same requirements of reasonableness and equality; neither can be departed from directly or indirectly; and discrimination must be prevented in either case, else the purpose of the Act will be subverted.

The penalties provided in the first paragraph of Section 10 of the Act apply equally to both classes of carriers for acts of discrimination. As was said by Judge Cardozo, of the New York Court of Appeals, in the recent case of *Postal Telegraph Co. vs. Associated Press*, 127 N. E. p. 256.

> "A tariff may be an established one for telegraph companies as for railroads; its marks may be less definite and obvious; to identify it may be harder; nonetheless, while it exists, there is a like duty to adhere to it within the limits of equality and justice. I think there is evidence justifying a finding that the plaintiff established a new tariff in September, 1915, as effectually as if it had put the changes in writing and filed them in a public office."

Inasmuch as petitioner followed the method provided by the Act in establishing its tariffs, rules and regulations, these tariffs, rules and regulations must, to paraphrase the language of Mr. Justice Lamar in the case of *Pennsylvania Railroad Co. vs. International Coal Co.*, 237 U. S. 197, "be treated as though it had been a statute binding as such upon the telegraph company and its customers alike."

In the case of *Postal Telegraph Cable Co. vs. Warren Godwin Lumber Co.*, 251 U. S., 27, Mr. Chief Justice White said:

> "As it is apparent on the face of the Act of 1910 that it was intended to control telegraph companies by the Act to regulate Commerce, we think it clear that the Act of 1910 was designed to and did subject such companies, as to their interstate business, to the rule of equality and uniformity of rates, which it was manifestly the dominant purpose of the Act to regulate commerce to establish, a purpose which would be wholly destroyed, if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent and it may be conflicting local laws."

We submit that the decision of the Circuit Court of Appeals absolutely destroys the equality and uniformity of telegraph and cable rates. If that decision be correct, the

conditions governing the transmission of messages are not to depend upon the tariff regulations, but upon mere accident. If the message be written on a regular blank of the company, recovery is limited to the price of the message; if written upon blank paper, or if telephoned to the company, recovery can be had for an unlimited amount; though in each case the same service is rendered and the same rate charged.

Your petitioner, by way of summary shows that the United States Circuit Court of Appeal for the Fifth Circuit erred in its opinion and decision as follows:

(a) The court erred in holding that respondent was not bound by the limitation of recovery contained in petitioner's tariff, rules, and regulations to the amount received by it for the transmission of the message.

(b) The Court erred in holding that the tariffs, rules and regulations of telegraph and cable companies adopted in pursuance of the Interstate Commerce Act are not to be given the same binding force and effect as the tariffs, rules and regulations of common carriers by railroad, regardless of whether or not the customer of the telegraph or cable company has specifically assented thereto.

(c) The effect of the Courts decision is to hold that although the message was delivered to defendant as an unrepeated message, and was received by the defendant and transmitted as such and subject to the conditions fixed for such classification, the Court arbitrarily set aside such classification, and without authority, established a classification applying to this message unknown to the Telegraph Company, all contrary to the provisions of the Interstate Commerce Act.

(d) The Court erred in affirming the judgment appealed from.

FOURTH. Your petitioner shows that this petition should be granted for the reason that the decision of the United States Circuit Court of Appeals is contrary to the provisions of the Interstate Commerce Act as interpreted by the decisions of this Court; that the effect of that decision is to destroy the purpose of that Act insofar as it relates to telegraph and cable companies, inasmuch as it opens wide the door to fraud and discrimination; that the precise question involved in this case has not heretofore been determined by any federal Court, and that if this decision is allowed to stand, it will serve to confuse the federal and state Courts in relation to the Interstate Commerce Act as applicable to telegraph and cable companies; that a great proportion of the messages transmitted by petitioner and by other telegraph and cable companies are transmitted without being originally written on the blank forms of said company, and that innumerable cases will, therefore, be presented to the Court involving the same principles of law applicable to this case, and that it is, therefore, most desirable as a matter of public policy that this question should be decided by this Court, so that there should be no uncertainty as to the law nor conflicting decisions in regard thereto.

FIFTH. Your petitioner has no right of appeal or writ of error herein to this Honorable Court, because the jurisdiction of the District Court and of the Circuit Court of Appeals depended entirely on diverse citizenship. The Circuit Court of Appeals stayed its mandate until this petition could be presented and passed upon by this Honorable Court.

Your petitioner presents herewith as a part of this petition a brief showing more fully its views upon the questions involved, and a transcript of the record in the Circuit Court of Appeals.

In conclusion, we earnestly urge the Court to take notice of the great importance, not only to telegraph companies, but to the business public who use the telegraph, of having an authoritative determination of this great question ONE WAY OR THE OTHER. Unless and until this Court speaks, inferior Courts, both State and Federal, are more likely to follow the conclusion reached by the Circuit Court of Appeals, and to hold that the telegraph company is liable or not in these cases accordingly as the message is not or is written on one of the usual blanks. While formerly the practice of telegraph companies in requiring that messages, before acceptance, be written on the usual blanks was very strictly enforced, it has in late years been greatly relaxed, because of the conviction that since the Act of 1910 the limitations of liability were available regardless of the form in which the message came to the telegraph company's office. This relaxation of the former strict rule has been of great practical convenience both to the companies and their patrons. Not only has it made it possible to accept large numbers of messages by telephone, but it has prevented the slight delays and annoyances which were incident to the old practice of compelling the sender, who had prepared his message on plain paper, to copy it or paste it on a sending blank.

If the Circuit Court of Appeals is wrong, the telegraph companies should not be subjected to the multitude of suits which will doubtless be brought in reliance on

this opinion, as soon as that opinion is generally known. If the Circuit Court of Appeals is right, the telegraph companies should know it at once, in order that they may readjust their business to the changed conditions, and protect themselves in the only way in which protection is possible—by insisting on a strict observance of the rule that messages must be written on the regular blanks.

Your petitioner believes that the aforesaid decree of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require this case to be certified to it for its review and determination in conformity with the provisions of the Act of Congress in such cases made and provided.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may be issued out and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and to send to this Honorable Court on a certain day to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, therein entitled "*Western Union Telegraph Company*, plaintiff in error, *vs. Esteve Brothers & Company*, defendant in error," No. 3,506, as identified by the transcript of the record, and to cease and withhold any further action or order in said case until the further order of this Court, to the end that said case may be reviewed and determined by this Court as provided in paragraph 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes," approved March 3, 1891; and that your petitioner may have such other and further

relief or remedy in the premises as to this Court may seem appropriate and in conformity with said Act; and that said judgment of the said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

WESTERN UNION TELEGRAPH COMPANY,

By

RUSH TAGGART,

W. B. SPENCER,

FRANCIS RAYMOND STARK

Attorneys for Petitioner.

STATE OF LOUISIANA,
PARISH OF ORLEANS.

Esmond Phelps, being duly sworn, says that he is one of the counsel for Western Union Telegraph Company, petitioner herein; that he has prepared the foregoing petition, and that all the allegations therein contained are true as he verily believes.

Esmond Phelps

Sworn to and subscribed before
me this 4 day of Aug 1920.

Pierre D. Olivier

Notary Public.

I, Rush Taggart, attorney and counsellor at law, admitted to practice in the Supreme Court of the United States, hereby certify that I have examined the foregoing petition for a writ of *certiorari;* that same is not made for the purpose of delay; and that in my opinion said petition is meritorious and well founded in law, and ought to be granted and the writ issued.

Rush Taggart

BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI.

No......

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TERM .....

WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

versus

ESTEVE BROTHERS & COMPANY,
Respondent.

May It Please the Court:

Respondent, a partnership composed of residents of Spain and a resident of Savannah, Georgia, instituted suit in the Civil District Court for the Parish of Orleans, State of Louisiana, against petitioner, a corporation organized under the laws of the State of New York, to recover the sum

of Thirty-one Thousand, Seven Hundred Twenty-five Dollars ($31,725), as damages sustained by it by reason of an error in the transmission of a cablegram from Barcelona, Spain, to New Orleans, Louisiana. On proper petition and bond, petitioner removed its case from the State Court to the United States District Court for the Eastern District of Louisiana, on February 28, 1918. The petition for removal was based entirely on the ground of diversity of citizenship (Tr. p. 8). Thereafter, petitioner filed an answer, in which it "*inter alia*" specially averred that its liability was restricted to the proportion of the tolls paid by respondent for the transmission of the message sued on which accrued to petitioner, or the sum of Four and 65/100 dollars ($4.65), for the reason that said message was an unrepeated message, and that under the rules, regulations and tariffs filed by it with the Interstate Commerce Commission under the Act of Congress of June 18, 1910, its liability for errors in unrepeated messages was restricted to the price received by it for transmitting such messages (Tr. pp. 16 to 18). The case was tried before a jury upon an agreed statement of facts. The motion of respondent for the direction of a verdict for the full amount of the loss shown by said statement of fact, to-wit, the sum of Thirty-one Thousand and Ninety-Five dollars was granted by the Court, and the motion of petitioner to direct a verdict for Four and 65-100 dollars, the proportion of the amount received by it for the transmission of the message, was denied. Petitioner's motion was based upon the following grounds:

> "That to hold defendant liable in this case beyond the amount of the liability provided for in its established classifications and tariffs filed with the

> Interstate Commerce Commission, to-wit: The amount of the proportion of the tolls accruing to the defendant, or the sum of four and 65/100 dollars, with interest from the date of the message, would be in contravention of Article 1, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and of the Act of Congress approved June 18, 1910." (Tr. p. 23.)

Exceptions were duly taken to the granting of respondent's request for a direction of a verdict and the refusal of petitioner's request, and the jury then brought in a verdict for Thirty-one Thousand and Ninety-five dollars ($31,095), (Tr. p. 40), and judgment was rendered on February 12, 1920, for that amount, (Tr. p. 41). From this judgment petitioner prosecuted a writ of error to the Circuit Court of Appeals of the United States for the Fifth Circuit, and the said Court of Appeals on May 26, 1920, affirmed the judgment of the District Court.

The material facts, as shown by the agreed statement of facts, (Tr. pp. 11 to 19), are as follows:

On September 13, 1917, respondent deposited in the office of the Telegraph Administration of the Spanish Government, at Barcelona, Spain, a cablegram addressed to its branch at New Orleans, Louisiana, directing the sale of two hundred (200) bales of cotton futures. The message was correctly transmitted from Barcelona, Spain, to Paris, France, where it was delivered to the telegraph lines of the French Government, which in turn transmitted it correctly and delivered it to petitioner's cable system at Havre, France, over which it was transmitted correctly to New York City, where it was turned over to petitioner's land line

system for the transmission between New York City and New Orleans. In the course of transmission between New York and New Orleans the word "hundred" was changed to "thousand," and respondents New Orleans office accordingly sold two thousand bales of cotton futures. Immediately upon discovery of the mistake, respondent closed out the transaction at a loss of Thirty-one Thousand and Ninety-five dollars ($31,095), due directly to the error in transmission.

In the month of May, 1916, petitioner, acting under authority of its executive committee, filed with the Interstate Commerce Commission its classifications of land line and cable messages and filing forms of such messages together with the conditions under which the various classes of land line and cable messages are handled and its tariffs and schedules, and all of said documents have been ever since on file with the Interstate Commerce Commission. Said form of cable message contains the following provisions, (Tr. p. 36):

> 'All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a cable message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-quarter of the unrepeated cable message rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated cable message, and paid for as such. It is agreed between the sender of the following message and this company that this company shall not be liable for mistakes or delays in transmission or delivery of any unrepeated message beyond the amount of that portion of the tolls which shall accrue to this company."

Said form of land message contained the following provisions, (Tr. p. 31):

> "All telegrams taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a telegram should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated telegram, and paid for as such. In consideration whereof it is agreed between the sender and the telegraph company as follows:
>
> "1. The company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated telegram beyond the amount received for sending the same."

No request was made by respondent for the repetition of said message. The amount paid by respondent for the transmission of said message was the amount specified in the tariff then on file with the Interstate Commerce Commission for the transmission without repetition of a message containing the number of words contained in the message sued on from Barcelona, Spain, to New Orleans, Louisiana. This rate was not a joint rate, but the sum of the local rates of each of the three connecting systems over which the message passed. Had respondent requested the repetition of said message, it would have been required to pay an additional amount. None of petitioner's aforesaid forms or blanks were used at the time in the receiving or transmission of said message.

After the rendition of the judgment in the District Court petitioner presented its bill of exception, which was duly settled and allowed, and its petition for a writ of error,

and obtained an order granting a writ of error on furnishing bond for Forty Thousand Dollars ($40,000). In connection with its petition for a writ of error, defendant filed the following assignments of error:

> (1) "That the Court erred in overruling the objection of the defendant as to the admissibility of the facts stated in paragraph 7 of the stipulation of facts relative to the damages sustained by plaintiff, for the reason that said facts were irrelevant and immaterial inasmuch as the liability of defendant was limited to the portion of the tolls accruing to it for the transmission of the message sued upon, or the sum of $4.65, for the reason that said message was an unrepeated message and paid for as such, and that the tariffs, rules and regulations, and forms of messages of defendant on file with and approved by the Interstate Commerce Commission at the time of the sending of the message in question provided that in the case of unrepeated messages, the liability should be limited to the portion of the tolls received by defendant; and therefore, to hold defendant liable in this case, beyond said amount contravenes Article 1, Section 8, Sub-division 3 of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign countries, and the Acts of Congress passed in pursuance thereof, especially the Act of Congress approved June 18, 1910.
>
> (2) "The Court erred in granting the motion to return a verdict in favor of plaintiff in this cause for $31,095.00 for the reason that the liability of defendant was limited to the portion of the tolls accruing to it for the transmission of the message sued upon, or the sum of $4.65, for the reason that said message was an unrepeated message and paid for as such, and that the tariffs, rules and regulations, and

forms of messages of defendant on file with and approved by the Interstate Commerce Commission at the time of the sending of the message in question provided that in the case of unrepeated messages, the liability should be limited to the portion of the tolls received by defendant; and, therefore, to hold defendant liable in this case beyond said amount contravenes Article I, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and the Acts of Congress passed in pursuance thereof, especially the Act of Congress approved June 18, 1910.

(3) "The Court erred in overruling the motion of the defendant that the Court direct a verdict in favor of plaintiff in the sum of $4.65 with interest at the rate of five per cent (5%) from September 13, 1917, for the reason that the liability of defendant was limited to the portion of the tolls accruing to it for the transmission of the message sued upon, or the sum of $4.65, for the reason that said message was an unrepeated message and paid for as such, and that the tariffs, rules and regulations ,and forms of messages of defendant on file with and approved by the Interstate Commerce Commission at the time of the sending of the message in question, provided that in case of unrepeated messages, the liability should be limited to the portion of the tolls received by defendant; and therefore, to hold defendant liable in this case beyond said amount contravenes Article I, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and the Acts of Congress passed in pursuance thereof, especially the Act of Congress approved June 18, 1910."

ARGUMENT

Point One.

AS THE MESSAGE IN SUIT WAS AN UNREPEATED MESSAGE, THE LIABILITY OF PETITIONER WAS LIMITED TO THE PORTION OF THE TOLLS ACCRUING TO IT, OR THE SUM OF FOUR & 65/100 ($4.65) DOLLARS.

Until the passage by Congress of the Act of June 18, 1910, telegraph and cable companies were not subject to the Interstate Commerce Act. By the amendment of 1910, telegraph and cable companies were declared to be common carriers within the meaning and purpose, and subject to the provisions of the Act, and special provision was made for the classification of their messages.

We quote the following from paragraphs one and three of Section 1 of the Interstate Commerce Act, as thus amended. (U. S. Compiled Statutes, Ann. Vol. 8, Sec. 8563.);

> "The provisions of this Act shall apply to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district of the United States to any other state, territory, or district of the United States, or to any foreign country, who shall be considered, and held to be common carriers within the meaning and purpose of this Act; provided, however, that the provisions of this Act shall not apply to the transmission of messages by telephone, telegraph, or cable wholly within one state and not transmitted to or from a foreign country, from or to any state or territory, as aforesaid.

> All charges made for any service rendered or to be rendered in the transportation of passengers or property, or for the transmission of messages by telephone, telegraph, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service, or any part thereof, is prohibited and declared to be unlawful; provided that messages by telegraph, telephone or cable subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, govment, and such other classes as are just and reasononable, and different rates may be charged for the different classes of messages."

The effect to be given the amendment of 1910 was clearly and forcibly stated by Mr. Chief Justice White in the recent decision of *Postal Telegraph Cable Company vs. Warren Goodwin Lumber Company*, 251 U. S. 27. That case not only upheld the validity of the unrepeated message stipulation, but also decided that the Act of 1910 excluded state regulation of interstate telegrams; and, hence, that state Courts must recognize and uphold this stipulation as to interstate messages, even though the state law declared such a stipulation void. The Court said: (p. 30).

> "In the first place, as it is apparent on the face of the Act of 1910 that it was intended to control telegraph companies by the Act to Regulate Commerce, we think it clear that the Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates, which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish, a purpose which would be wholly destroyed if, as held by the Court below, the validity of contracts made by telegraph companies as to their interstate commerce

business continued to be subjected to the control of divergent and it may be conflicting local laws.

In the second place, as in terms the Act empowered telegraph companies to establish reasonable rates, subject to the control which the Act to Regulate Commerce exerted, it follows that the power thus given, limited of course by such control, carried with it the primary authority to provide a rate for unrepeated telegrams and the right to fix a reasonable limitation of responsibility where such rate was charged, since, as pointed out in the *Primrose Case*, the right to contract on such subject was embraced within the grant of the primary rate making power.

In the third place, as the Act expressly provided that the telegraph, telephone or cable messages to which it related may be classified into day, night, repeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages, it would seem unmistakably to draw under the federal control the very power which the construction given below to the act necessarily excluded from such control. Indeed the conclusive force of this view is made additionally cogent when it is considered that as pointed out by the Interstate Commerce Commission, (*Clay County Produce Co. vs. Western Union Telegraph Company*, 44 I. C. C. 670) from the very inception of the telegraph business, or at least for a period of forty years before 1910, the unrepeated message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest."

We would also quote the following language from the opinion of the Circuit Court of Appeals for the Eighth Circuit in the case of *Gardner vs. Western Union Telegraph Company*, 231 Fed. 409, which was cited with approval in the *Warren Godwin case*.

> "It appears beyond question therefrom that in so far as the provisions of the Act to regulate commerce are applicable, it applies to all interstate telegraph business; that as to all interstate business, telegraph, telephone, and cable companies are common carriers within the meaning and purpose of the Act; that, as to their interstate business, telegraph companies must print and publish their rates, rules, classifications, regulations, and practices, and file same with the Interstate Commerce Commission; that they shall establish reasonable rates, rules, regulations, and practices, but messages may be classified into day, night, repeated, unrepeated, and such other classes as are just, and reasonable, and different rates may be charged therefor; that all rates, regulations, and practices must be reasonable and just; that penalties are imposed for any attempt to evade the published rates, rules, practices, or regulations; that the Interstate Commerce Commission shall determine what is a just and reasonable regulation or practice; that the rules and regulations established by telegraph companies or other common carriers are deemed reasonable and just until changed by the Interstate Commerce Commission. It results necessarily from the foregoing conclusions that Congress has not only taken possession of the field of interstate commerce by telegraph, but has also specifically prescribed the rules which shall govern the transaction of such commerce."

In view of the language of the Act of 1910, and of its interpretation by the Supreme Court of the United States and by the Circuit Court of Appeals for the Eighth Circuit in the cases above cited, it is manifest that the principles enunciated in the many decisions of the Supreme Court as to the effect of the provisions in the tariffs of common car-

riers by railroad are equally applicable to telegraph and cable companies. Those decisions conclusively establish the following propositions:

FIRST: That the public are bound by the rates provided by the tariffs on file with the Interstate Commerce Commission, regardless of knowledge, assent, or even misrepresentation. (*Gulf, Col. & Sante Fe Railway vs. Hefley*, 158 U. S. 98; *Texas & Pacific Railway Company vs. Mugg*, 202 U. S. 242; *Louisville & Nashville R. R. Co. vs. Maxwell*, 237 U. S. 94, and cases cited therein.)

SECOND: That a limitation of liability contained in or filed with the tariffs is an essential part of the rate, and that a shipper or passenger is bound thereby, even though he has no knowledge thereof, and has not assented thereto. (*Boston & Maine R. R. vs. Hooker*, 233 U. S. 97, and cases cited therein.)

The situation presented in the *Hooker case* was substantially the same as that presented in the case at bar. In that case, plaintiff had checked her baggage on a first-class railroad ticket purchased by her; no inquiry was made of her as to its value, nor did she assent to any limitation of liability, nor have any knowledge of any tariff provisions on that subject. However, the tariffs on file with the Interstate Commerce Commission contained a provision limiting baggage liability to $100 in the absence of a greater declared value. Upon these facts the Court held that the recovery for the loss of the baggage due to the negligence of the carrier was limited to $100. The Court said (p. 110):

> "The cases in 226 and 227 U. S., it is true, involved liability for express or freight shipments made upon express receipts, bills of lading or separate contracts, showing on their face or by reference to tariffs the opportunity for valuation for

the purpose of fixing the rate and liability, and the limitation appearing in such form of contract was declared to be valid and effectual to relieve the carrier from a greater liability than that therein expressed. But the Court did not stop there: In *Adams Express Co. vs. Croninger, supra,* p. 509, it said: "The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission." In *Kansas City Southern Ry. Co. vs. Carl, supra,* p. 652, this Court said: "The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate when made out and filed, is notice, and the effect is not lost, although it is not actualiy posted in the station. *Texas & Pacific Railway cs. Mugg,* 202 U. S., 242; *Chicago & Alton Ry. vs. Kirby,* 225 U. S. 155. It would open a wide door to fraud and destroy the uniform operation of the published tariff rate sheets. When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value. Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay . . . . . (p. 654). To the extent that such limitations of liability are not forbidden by law, they become, when filed, a part of the rate." And in *Mo. K. & T. R. R. Co. vs. Harriman, supra,* this Court said that the shipper was compelled to take notice of the rate sheets contained in tariff schedules (p. 669), "not only because referred to in the contract signed by them, but because they had been lawfully filed and published..... (p. 671). When the carrier graduates

> its rates by value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate." In *Chicago, R. I. & P. Ry. Co., vs. Cramer*, 232 U. S., 490, this Court said, p. 493: "That rule of liability (the uniform rule established by the Hepburn Act) is to be enforced in the light of the fact that the provisions of the tariff enter into and form a part of the contract of shipment, and if a regularly filed tariff offers two rates, based on value, and the goods are forwarded at the low value in order to secure the low rate, then the carrier may avail itself of that valuation when sued for loss or damage to the property."

We submit that the decision in the *Hooker case* is determinative of the question here presented. The *ratio decidendi* of that case, and of the many other cases upholding the validity of the rates and the limitations of liability prescribed in the tariffs on file with the Interstate Commerce Commission, was the recognition of the necessity of making effective the purpose of the Interstate Commerce Commission Act "to have but one rate open to all alike, and from which there could be no departure." (*Boston & Maine Rd. vs. Hooker, supra*, p. 112.) The decisions were bottomed upon broad grounds of public policy and without regard to the equity of the claim of the particular litigant. The same reasons of public policy that were the basis of those decisions necessitate the enforcement of the tariff limitation in the case at bar.

> "Almost from the beginning of telegraphy in this country, the basic rate has been that charged for the transmission of an unrepeated message, the rates

for repeated, and special value messages being built upon it. The unrepeated rate of charge has always been made upon the condition stated in the contract between the sender and the company, that no liability should attach to the company for errors in the transmission, or delays in the delivery beyond the sum received for sending the message."

(*Clay County Produce Co. vs. Western Union Telegraph Company*, 44 I. C. C., 670).

More than a quarter of a century ago, the Supreme Court of the United States recognized the validity of the unrepeated message stipulation, (*Primrose vs. Western Union*, 154 U. S., 1); and in 1910 Congress placed its seal of approval on that decision by providing that messages might be classified into "repeated, unrepeated, and such other classes as are just and reasonable." Furthermore, Congress recognized that the limitation of liability was an integral part of the rate by providing that different rates may be charged for the different classes of messages.

It is clear, therefore, that the limitation of liability to the price of the message is the prime factor in fixing rates for unrepeated messages, that uniformity in rates can only be maintained by enforcing this stipulation in every case where no request has been made for a repetition of the message at the advanced rates, and that to make the enforcement of this condition depend entirely upon whether the message was written on the blank form of the company would open the door wide to fraud and discrimination, would violate the fundamental principle that all persons be charged the same rate for the same service, and would destroy the effectiveness and uniformity of the Act.

Opposing counsel assert that the *Hooker* and other decisions cited ante are not applicable because the de-

fendant company was not compelled under the law to file any tariffs with the Interstate Commission. We submit that this is a distinction without a difference. The question of whether or not the defendant was compelled to file its tariffs is rendered immaterial by the fact that it had done so long prior to the sending of the message sued on. Those rates, and the conditions that were a part of those rates, became binding upon the public and the company alike, upon their adoption by the company in conformity to the authority vested in it by the Act, and could not be departed from until changed either by the fixing of new rates, or by the order of the Commission. Not only has the Commission not seen fit to disturb the unrepeated message stipulation, but it had, four (4) months before the sending of the message in suit, held that it had jurisdiction to consider the reasonableness of that stipulation, and had held the stipulation valid. (*Clay County Products Co. vs. Western Union Telegraph Co.*, 44 I. C. C., 670).

In the course of its opinion, the Commission said, (p. 674):

> "Under the Act, as has many times been said, the right to initiate their rates rests with the carriers. As section 6 does not apply to telephone and telegraph companies, it may well be said that in a special sense and to a special extent such companies do initiate their charges. But it has not been thought or even suggested that a telephone or telegraph company, after having fixed and established a charge for a particular service, or a regulation pertaining to or affecting the rate or service, may depart from the charge, or from the regulation affecting the charge, at its discretion or until the charge or regulation has been lawfully changed by it. The Courts have often said that the vital feature of the Act to

regulate commerce is to secure equality and uniformity as to all persons availing themselves of the services of the common carriers and to destroy any favoritism by such carriers among those requiring their services. This principle, founded in common right as well as in common justice, runs all through the supplementary legislation enacted in aid of the enforcement of the Act. It can not, therefore, be doubted, and indeed the complainants here do not contend to the contrary, that even though section 6 is inapplicable to telephone and telegraph companies, their rates and charges are nevertheless binding upon such companies, when they have lawfully been fixed and offered to the public; and the rates and charges must be observed, together with the rules and practices affecting the rates and charges, until they have lawfully been changed, either voluntarily or under the orders of this Commission. Having been declared to be common carriers, and having been subjected to the general provisions of the Act, it is manifest that telephone and telegraph companies may not lawfully accept or exact of one person either less or more than they demand of another person for the same service. To secure such uniformity in their dealing with the public was doubtless one of the purposes of the Congress in subjecting telephone and telegraph companies to the provisions of the Act to regulate commerce; and we think the language used by the Congress in doing this was sufficient to accomplish the end sought. It is scarcely necessary to add that there can be no uniformity in the application of the rates and charges of such companies, unless rules and regulations like those here under consideration, that directly affect the rates, are also enforced without discrimination or preference."

The Interstate Commerce Act outlined certain steps that must be taken by the various carriers before a rate becomes legal. In the case of carriers of persons and property one of the steps necessary to the establishment of a legal rate or regulation is the filing of the rate or regulation with the Interstate Commerce Commission, and no rate or regulation can become legal or effective until it is filed, simply because the law says it must be filed. In the case of the other carriers subject to the same act, namely, telegraph companies, the act does not require the filing of the rate or the regulation, but expressly states that the act or regulation is legal and binding once it is fixed and established by the carrier. Again, as pointed out in the *Cultra* opinion, the carrier initiates the rate and the regulation, and once a rate or regulation is so initiated it is, and remains, the legal rate or regulation until it is changed by the act of the carrier itself or by the Interstate Commerce Commission. Therefore, while the method of establishing a legal telegraph rate under the Act of Congress in question differs from that imposed upon carriers of persons and property, the object in the case of all carriers is the same, namely, the attainment of equality of rate, regulation and service, and the prevention of discrimination.

It is not the filing of the rate in the case of carriers of persons and property that creates constructive notice of the regulations under which these carriers are doing business, but it is the establishment of a legal rate or regulation that results in constructive notice on the part of the public. That the mere filing of a rate or regulation is what constitutes constructive notice is a misconception; the Congress had no such intention in mind. What was sought was uniformity. There would be no uniformity of service

if the legal rate or regulation could be deviated from by accident or design. The test, therefore, which should be applied is not, as we have indicated above, whether a rate or regulation is on file with a regulatory body, but rather whether the rate charged and the regulation which attaches to and is a part of the rate, is the legal rate, and if it is the legal rate, what service is to be performed therefor. As we have pointed out, in the case of carriers of persons and property, a rate is not legal until it is filed and, therefore, unless the rate involved has been filed, a carrier cannot in an action at law invoke the doctrine of constructive notice, not because of the physical fact that it has failed to file the rate, but because having failed to file it, it is not a legal rate. Therefore, the question of filing does not enter into the determination of the question whether the telegraphic rate charged is, or is not, the legal rate; the test in the case of a telegram is, Was the rate charged the one initiated by the telegraph company prior to the date of the message involved and was it, therefore, the regular established rate? If it was, then it is the legal rate, and if it is the legal rate, the doctrine of constructive notice must apply just as forcibly and just as effectively as the doctrine applies in the case of carriers of persons and property who have established a similar legal rate. The principal object in filing the defendant's rates and schedules with the Interstate Commerce Commission was to make it easy to show what the legal rate and regulation was on the particular date; it was not because defendant was under any misconception as to the necessity of filing rates or regulations, or as to the effect of such filing on the question of whether a rate or regulation was legal.

In other words, the fact that the Interstate Commerce Commission has not seen fit, under Section 6 of the Interstate Commerce Law, to require this defendant to file its tariffs and regulations, is immaterial in view of the fact that the Commission, under its powers, granted by Congress, over interstate carriers including the defendant, has assumed and exercised the right of regulation and supervision of the tariffs and regulations filed by defendant, and has recognized such tariffs and regulations as the legally established ones. It has expressly recognized those tariffs and regulations as binding upon all until changed; that binding force resting not upon any acceptance of such terms by the shipper when he contracts with the carrier, but upon the reason of public policy which as a matter of law imports knowledge and acceptance of such terms to every shipper, no matter how he deal with the carrier. Such being the case, and those tariffs and regulations having been repeatedly upheld as to the general public, they can not without violation of the provisions against preference and discrimination, be invalidated as to a particular class of users of the defendant's facilities for interstate commerce.

The question of the defendant filing its tariffs with the Interstate Commerce Commission is also immaterial when considered from a fair analysis of the provisions of the Interstate Commerce Act. It is significant that immediately after the enactment of the amendment taking effect August 10, 1910, by which telegraph, telephone and cable companis were made subject to this Act to regulate commerce, the Interstate Commerce Commission, after careful hearing of the parties interested, considered the sections of the Act which apply to such companies, and in conference ruling 305 in the latter part of the year 1910, or early in the year

1911, announced its conclusions that telegraph, telephone and cable companies must conform to the provisions of Section 1 of the Act requiring that all of their rates and charges for the transmission of interstate messages shall be reasonable and just and may lawfully issue franks covering their interstate service to the same extent as other common carriers under the provision of said section; and that they were also governed by the provisions of Section 3 forbidding any undue or unreasonable preference or advantage by rebates or otherwise, or any undue or unreasonable prejudice or disadvantage whatsoever, and are subject to the lawful orders of the Commission pursuant to Section 15 of the Act and also to Section 20 thereof.

Let us examine for a moment the effect of these particular sections of the Act which the Commission thus concluded applied to and governed actions of telegraph companies.

By Section 1, as has been indicated above, they were designated as common carriers under and subject to such provisions of the act as were made specifically applicable to them in the transmission of messages between the states and territories and from or to foreign countries. By Section 1 they were also required, together with all common carriers named in the act, to have their service charges for such transmission just and reasonable, and every unjust and unreasonable charge was prohibited. It was also made the duty of such common carriers to enact just and reasonable regulations and practices respecting the management of their business, and they were also specifically authorized to classify into certain defined classes messages for transmission and to make different rates for the different classes of messages.

It will be observed that these provisions apply to all classes of transmission companies and necessarily govern all such transmission within the territorial limits of the United States.

By Section 3 of the act it was made unlawful for any common carrier, subject to the provisions of the act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

By Section 15 there was granted to the Commission either upon its own initiative or upon complaint, power to investigate and examine, and whenever "the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property, or for the transmission of messages by telegraph or telephone, as defined in the first section of this act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is

just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practices so prescribed."

Section 20 deals with reports, method of keeping accounts, and throws no light on questions involved in this case.

A careful reading of the sections of this Interstate Commerce Act will indicate that the duties of common carriers are defined in Sections 1, 2, 3 and 4; 2 and 4 having special reference to transportation carriers, do not apply to the telegraph and cable companies; 1 and 3 unquestionably do. The subsequent sections of the act relate to the methods, procedure and instrumentalities which, in the opinion of Congress, were necessary to be employed in order to secure the observance of the obligations set forth and enacted in the four sections to which we have referred. These subsequent sections provide different methods by which different classes of carriers are required to proceed in the transaction of their business in the observance of the duties of uniformity of service and equitable dealings with the public as defined in the first four sections of the act.

Thus, Section 6 requires, before carriers of goods and passengers shall embark in the business of such transportation, that their rates, fares and charges shall be filed with the Interstate Commerce Commission, and be posted at stations, and such carriers are prohibited from engaging or participating in transportation of passengers or property

unless such schedules have been thus filed with the Commission and posted; in addition, there is prohibition against the charging, demanding or collecting greater or less, or different, compensation than such as is provided in the tariff in effect at the time.

It is obvious in tracing the historic development of the act and the amendments made since the original enactment of the legislation in 1887 that the additional requirements in this Section 6 and other features closely connected therewith found in other sections of the act are applicable to this particular class of carriers, that they have been added to the act in order to secure from such carriers the due observance of the provisions of Sections 1, 2 and 3 of the act, which remain substantially as originally enacted.

The mere filing of these schedules by this particular class of carriers as provided in Section 6 has no significance or peculiar value with respect to the rates, except as they secure to the persons dealing with the carriers the equal facilities to protection against unreasonable and discriminatory charges, and that were required of the carriers before these special requirements were fixed by Congress. Carriers before such amendatory legislation were under obligations to render equal service and were required to extend to each and every customer the same rates and facilities as since these schedules have been required to be thus filed with the Interstate Commerce Commission. The mere fact that such requirements are now exacted of this particular class of carriers is an evidence not that any peculiar merit attaches or duties arise because of the filing of these schedules, but that Congress has concluded in its wisdom that in that method alone can the performance of the obligations of Sections 2 and 3 be secured. There has been no change of obligation. The obligations of the carrier remained the

same at all times, but the method of securing performance has, as we have seen, by the amendments to the act, and particularly to Section 6, been made much more rigid in this class of carriers. It is also to be noted that while such has been the case with transporters of freight and passengers, the obligation existing under Section 3 of the act and under Section 1, with respect to telegraph companies, is identically the same as that of carriers of freight and passengers. The regulation of both classes of carriers must be reasonable; their charges for service rendered must also be reasonable. Unreasonable charges are equally prohibited as to both. The quality of service exacted from both is identical, but in the case of telegraph companies Congress has concluded that it is permissible for the carrier to put rates into effect without their previous filing with the Commission and without their publications at stations, as is also the case with respect to its regulations and classifications of messages and the rates therefor.

The procedure thus differs with these two classes of carriers, but the obligations of the carriers to the public are identically the same, and the obligations of the public to the carriers are likewise identically the same, and defined in the same language in Sections 1 and 3 of the act. This is clearly indicated by Commissioner Harlan in the Clay County Products Company case in the foregoing quotation from his opinion and also in the succeeding paragraph, where he says—following the statement with respect to the unrepeated message rate:

> "The fundamental difference between the unrepeated rate and the other two classes of rates is that under the former the sender assumes the risk of error or delay, while under the latter the carrier assumes the risk in part or entirely, as the case may

be; and the rules fixing the measure of the defendants liability under these several classes of rates are essentially a part of the rates themselves."

And still further in the course of the opinion, after discussing the proviso in the first section of the Interstate Commerce Act, authorizing the classification of messages into the different classes with the right to charge different rates, he says:

> "It seems clear, therefore, that the Congress in recognizing, by the amendment to the act above quoted, these three classes of messages with the different charges attached, has also recognized a distinction in the defendant's liability under them, and has sanctioned this distinction for the future, subject, of course, to the general provisions in the act requiring all rates, and all rules and regulations affecting rates, to be reasonable and uniform in their application, under like circumstances, for the different kinds of service offered. Such classification of its messages, with the different rates and liabilities attaching to them, having affirmative recognition in the act itself, it follows that when lawfully fixed and offered to the public they are binding upon the defendant, and upon all those who avail themselves of its services, until they have been lawfully changed."

The same conclusion is indicated by Chief Justice White in the case of *Postal Telegraph Cable Company vs. Warren Godwin Lumber Company* in the first paragraph of the quotation from the opinion (cited *ante*). It conclusively follows from the foregoing that, although the telegraph companies under the act have the right to initiate rates, fares and charges for the different classes of messages, and to establish reasonable regulations for their transmission

without filing the same with the Interstate Commerce Commission. yet, that such regulations have, as to the business which such companies are arranging to transact with the public, the same force and effect as regulations of carriers of freight and passengers have when filed with the Commission, in accordance with the provisions of Section 6; the difference between the two being simply that Congress in its wisdom has required the prior filing in the one case and dispensed with the necessity of such filing in the other, yet leaving each of the carriers subject to the same obligations to the public, and as Commissioner Harlan observes, the public is equally bound to observe the rules and regulations, notwithstanding the difference in the method of establishing such regulations and rates.

When the telegraph company, therefore, by its Board of Directors, duly enacted the regulations as the agreed statement of facts shows it did, and fixed the rates for the different classes of messages, which it had made, the rules for binding the public were such rules thus enacted until changed by such company or by order of the Commission; and it made no difference whether they were known to the public or not, each class of messages took the rate attaching to that class of messages and the difference in the liability as fixed by the regulations. Such is the effect of the decision of the Supreme Court in all the cases which have been before the Court respecting carriers of freight and passengers, and the fundamental principle which underlies these decisions under Section 3 of the Interstate Commerce Act which requires uniformity, applies just as completely in the case of transmission of messages as in the case of transportation of persons or property. In other words, the rates and the regulations which were fixed by the telegraph company constitute the methods by which alone it deals with

the public and the public deals with it until they are lawfully changed. There can be no special transaction outside of those rules and regulations as to either class of carriers.

The argument as to identity of obligation of carriers of property and persons and of transmission companies is strengthened by the provisions of the Esch Railroad Bill lately passed, which, in Section 404, amends Section 2 of the Interstate Commerce Act and makes that section apply to "transmission" as well as "transportation."

The *Hooker case*, the *Mugg case* and the other transportation cases (cited *ante*) are therefore directly in point upon this proposition, and such is the clear indication in the opinion of Commissioner Harlan in the *Clay County Products case*, and in the decision and opinion of Chief Justice White in the *Warren-Godwin Lumber Company case*.

If this were not so, a customer of a telegraph company may, by delivering his message to the telegraph company on a blank piece of paper, and claiming that he had no knowledge of the regulations, make the validity of the Commerce Act, and the regulations of the telegraph company lawfully established in accordance with its provisions, and their application to him, dependent upon his knowledge and his consent. Such was clearly not the intention of Congress. It would also open up the way to the grossest inequality of service, and such was also not the intention of the act. The construction of the act contended for makes the act effective both as to the telegraph companies and as to transportation cmpanies to the same degree and the same extent as it was evidently the intention of Congress that it should be.

The decision of the Supreme Court of Kansas in the case of *Shawnee Milling Co. vs. Postal Telegraph Cable Co.*, 166 Pac. 493, is squarely in point, as shown by the syllabus, which reads:

> "Where a telegraph message is dictated over a telephone and is thus received by a telegraph company for transmission, it will not be presumed that any preferential or discriminatory service in violation of law is intended, and the message will be considered as if it were written on the ordinary blank forms furnished by the telegraph company, and the company's liability for an error in transmission is neither greater nor less nor different than if the message were delivered in the usual and more formal mode of sending telegrams."

The plaintiff had judgment in that case because the message was intrastate, and it was held that the Federal law did not apply, and limitations contained in the defendant's standard message blanks were, under the local law, unreasonable. It also appeared that the defendant had not filed its schedule of rates and charges with the Public Utilities Commission, as required by law. But as to the questions involved herein, the sole distinction as to facts was that the Kansas statute affirmatively required the defendant's rates to be filed, while the Interstate Commerce Act does not impose such affirmative requirement on defendant herein, but makes its lawfully established rates binding on it, its customers, and the public until changed.

The Court in that case said:

> "It will thus be seen that the telegraph company has two principal schedules of rates—one for unrepeated messages, in which its liability for errors in transmission was limited to the amount received by it for sending the message, and a rate fifty per cent. higher for repeated messages in which its liability for erroneous transmission was stipulated in advance to be fifty times the sum paid for the service. These

rates must be filed with the Public Utilities Commission and may not be departed from by the telegraph company without the assent of that tribunal; and all discrimination and preferences in rates or service is forbidden by the public utilities act. (Gen. Stat. 1915, ch. 97; Laws of 1911, ch. 238, Secs. 3, 10, 11, 12, 20, 30.) The service performed by the defendant must be held to have been in pursuance of its regular corporate business, and it should be assumed that no discriminatory or preferential service was being extended to plaintiff when the defendant received plaintiff's message by telephone for transmission to Wichita. It must be considered as if the plaintiff had formally written the message in the usual way on regular blanks furnished by the company. That telegraph companies frequently accept messages by dictation over a telephone is well known. It would be harsh to say that any illegal preference forbidden by Section 8401 of the General Statutes of 1915 is intended in so doing. Nor would it be just to hold that in extending this apparently harmless courtesy the telegraph company thereby places itself in a less favorable position or assumes a greater responsibility than it does when it receives for transmission telegrams written in the usual way, with the usual conditions attached. Nevertheless, if this practice is to be regarded as a general one, carrying a different rate or subjecting the telegraph company to a different degree of responsibility, a uniform schedule of rates and charges for such service and the regulations pertinent thereto should be filed with the Public Utilities Commission and subject to its approval; and such rates and service are invalid until they are so filed; and when formally promulgated, they may not be departed from with impunity. (Gen. Stat. 1915, Secs. 8398, 8400, 8416; *The State ex. rel., vs. Postal Telegraph Co.*, 96 Kan., 298; 150 Pac., 544; *Mollohan vs. Railway Co.*, 97 Kan., 51; 154 Pac., 248.)

"The Court is of opinion that in the absence of

a distinct schedule of rates applying to telegrams delivered for transmission by telephone, the case is governed by the conditions attached to the usual and more formal mode of transacting its corporate business."

It is also said, and this was the basis of the ruling of the District Court below, that as the contract for transmission was made in a foreign country, the tariff provisions can have no bearing. The jurisdiction of the Commission over foreign messages is not denied; but it is claimed that the *"lex loci contractus"* governs, and that, as there was no limitation of liability under the foreign law, no such limitation will be enforced here.

It is true that the rights and obligations of the parties under a contract of carriage to be performed in several different states or countries will ordinarily be determined by *"lex loci contractus."* (*Liverpool Steam Co. vs. Phenix Ins. Co.*, 129 U. S., 397); but this general principle is subject to the exception that the contract will not be interpreted or enforced in accordance with the foreign law, when to do so would be to violate the public policy of the *"lex fori;"* and this is particularly true where, as in this case, the wrong complained of occurred in the jurisdiction in which the suit is brought (Corpus Juris on Contracts, Vol. 13, p. 257).

In the *Kensington case*, 183 U. S., 263, this Court refused to recognize a provision of a contract of carriage exempting the carrier from liability for negligence, though such provision was valid under the law of the place where the contract was made. The Court said (p. 269):

"As, however, the ticket was finally countersigned in Belgium, and one of the conditions printed on its face provides that 'all questions arising here-

under are to be settled according to the Belgium law, with reference to which this contract is made,' it is insisted that such law should be applied, as proof was offered showing that the law of Belgium authorized the conditions. The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the Courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by will of contracting parties can the public policy of a country be set at naught. (Story, Conflict of Laws, paragraphs 38, 244.) Whilst as said in *Knott vs. Botany Mills*, the previous decisions of this Court have not called for the application of the rule of public policy to the precise question here arising, nevertheless, that it must be here enforced is substantially determined by the previous adjudications of this Court. In *Liverpool & Great Western Steam Co. vs. Phenix Ins. Co.*, 129 U. S. 397, the question arose, whether conditions, exempting a carrier from responsibility for loss caused by the neglect of himself, or his servants, could be enforced in the courts of the United States, the bill of lading having issued in New York by a British ship for goods consigned to England. Despite the fact that conditions, exempting from responsibility for loss, arising from negligence, were valid, by the laws of New York, and would have been upheld in the courts of that state, it was decided that, in view of the rule of public

policy applied by the Courts of the United States, effect would not be given to the conditions. In the very nature of things, the premise, upon which this decision must rest, is controlling here, unless it be said that a contract, made in a foreign country, to be executed in part in the United States, is more potential to overthrow the public policy, enforced in the courts of the United States, than would be a similar contract, validly made, in one of the states of the Union. Nor is the suggestion valid that, because there is no statute expressly prohibiting such contracts, and because it is assumed no offence against morality is committed in making them, therefore they should be enforced, despite the settled rule of public policy to the contrary. The existence of the rule of public policy, not the ultimate cause upon which it may depend, is the criterion."

It is manifest that an agreement made in a foreign country by defendant to send cablegrams to various points in the United States at less than its tariff rates would be invalid and unenforceable in this country. So, too, an agreement made in a foreign country by defendant to repeat all telegrams in the United States and only to charge the rates provided for unrepeated messages would be illegal and unenforceable by our Courts. Yet this would be merely doing directly what plaintiff now seeks to accomplish by indirection, viz: to pay the lower rate provided for an unrepeated message and to escape the limitation of recovery to the price of the message, which is the basic factor in fixing that rate.

We submit that public policy requires that the tariff provision shall be enforced, whether the contract is entered into in this country, or in a foreign country. A contrary rule would open the door wide to evasion of the Interstate

Commerce Act, and would result in discrimination in rates in favor of foreigners and against our own citizens. It is inconceivable to us that such a result should be permitted by the Courts of this country; especially when as here, the breach of contract occurred within the territorial limits of the United States and there was a separate rate fixed for performance of that portion of the contract which was to be executed in this country.

The error which is the basis of the cause of action in this case occurred in the course of transmission between New York and New Orleans; the rate paid by plaintiff was a "Combination" rate, one component part of which was the rate from New York to New Orleans. Plaintiffs were not entitled to any greater service nor should defendant be subjected to any greater liability in the transmission of this message from New York to New Orleans than if it had been an ordinary unrepeated message, originating in New York. Could there be any question that in such a case the Court would follow the decision in the *Hooker case* and enforce the tariff limitation of liability?

In *Commercial Cable Co. vs. Western Union Telegraph Co.*, 41 I. C. C., 32, the Commission said (p. 38):

> "The defendant contends that the rates on messages from foreign countries to points in the United States are through rates; that this Commission has no jurisdiction over such through rates; that the defendant has no 'rates' on deferred messages from New York to points in the United States, the earnings received by the defendant on such messages being simply portions of the through charges accruing as divisions to the defendant for its part of the through services.

"Apparently the rates on messages from points in foreign countries to points in the United States are not 'joint through rates' such as those published by a railroad which holds the concurrence of its connections. The through rates, however, are made by adding together the rates or half rates of the several telegraph and cable companies which participate in the transmission, and thus the complete charge for the through service can readily be ascertained and quoted to the sender at point of origin. As previously stated, the through charge on a deferred message from an interior point in France to an interior point in this country would consist of three component parts, the French Government receiving one-half its local rate to Havre, the cable company receiving half its regular cable rate, and the land line in the United States receiving half its rate on regular cable message. It is clear, therefore, that the through rate is a 'combination' rate, one component part of which is the charge made by the land line for transmitting the message from New York to destination.

"It may be observed that the transmission of a through message is not a continuous service. The message must be transferred from a land line to a cable line on the European shores, and again transferred from a cable line to a land line at New York; and the defendant concedes that 'so far as defendant is concerned,' the messages may be regarded as originating in New York. Looking at the matter from this point of view it is clear that we have authority under the act to require the defendant, in imposing charges for its service within this country, to avoid unjust discrimination, not only as between persons, but as between carriers. In *Mattingly vs. Pennsylvania Co.*, 3 I. C. C., 592, at page 609, the Commission said:

> "'It (a common carrier subject to the act) cannot engage in the service and reject the obligations imposed for the regulation of the service. One of these obligations founded on the public interests is impartially in receiving, shipping, forwarding and delivering interstate traffic. There can be no preferential service in this respect as regards persons, carriers or traffic, and no refusal to do for some what is done for others, nor any unjust discrimination in charges.'"

The real question in this case is whether the telegraph Company, having adopted rules and regulations in accordance with the express requirement of the act, and having also in pursuance of the express provisions of Section 1 of the act, classified its messages and fixed different rates for such classifications, such regulations and rates control it and the public dealing with it in respect to the receipt and transmission of messages.

The claim of the telegraph company is that when such regulations have been thus adopted by it in accordance with the statute, as in this case, and have not been changed by the telegraph company, or by order of the Interstate Commerce Commission, whether they are known to the public dealing with it or not, they bind the public and it with respect to the rights and obligations of each in respect to such messages.

Unquestionably the position of the court below and of the plaintiffs in this case is that for some reason applicable to telegraph companies as distinguished from carriers of freight and passengers, such regulations are not thus binding. The Court in charging the jury in this case used this language:

> "The message was originally sent from Barcelona, in Spain, and the form stipulated in the tariffs on file with the Interstate Commerce Commission was not used, and my ruling is that the sender was not bound by these forms and tariffs on file with the Interstate Commerce Commission in the United States, that therefore the plaintiff can recover his actual damages, the case arising out of the mis-sending of a cable regarding the sale of cotton futures."

As we have had occasion to observe, the act while requiring the telegraph company to adopt and put in force reasonable regulations, does nowhere require that they shall depend for their validity upon being brought home to the knowledge of its customers tendering messages for transmission. Was it the intent of Congress that such regulations should depend for their validity upon being brought to the attention of the public and being assented to by the public by its adoption of them? No such intention is expressed in the act. Was it the intent of Congress that as to such persons as did not receive such information from the telegraph company, that such regulations should have no force or effect? That would be to impute to Congress the intent that the telegraph company might, by failing to make due publication in effect defeat the plain command of the act expressed in Section 3 that it should render equal service to all. Was it the intent of Congress that messages only tendered by the public written upon forms which were fixed in tariffs and carrying some or all of the regulations should be subject to the provisions of the Interstate Commerce act? If any of these things had been intended, would not Congress have expressed some indication of such requirement and distinction in regard to the application of the regulations and rates. There is nothing of that sort in the act

and inasmuch as the act was designed to secure equality of service (*Postal Telegraph Cable Company vs. Warren-Godwin Lumber Company*, cited *ante*), it is the fair conclusion that all that was required was the adoption of such regulations and the obedience to them and carrying them out in the performance of the business, and that the public was bound to take notice that such regulations had been made, and was bound by such regulations.

Is not this the fair implication arising from the historical development of the act? Originally the sole remedy sought by the enactment of the Interstate Commerce act was the elimination of inequalities and irregularities believed to obtain in the transportation of persons and property. From 1887, the enactment of the original act, until 1910, the act was concerned with the solution of that class of problems. In 1910, at the time of the passage of the amendment, the act of 1887 had been construed, added to by acts, supplemental and amendatory, until there might be said to be a complete system of regulations and laws attaching to carriers of freight and passengers. In that state of the law Congress concluded to amend and to bring telegraph companies under the provisions of the act. They made telegraph companies subject to the provisions of Section 1 and Section 3, which related to the fundamental obligations of carriers, including telegraph companies, respecting their relation to the public in the transmission of messages. They did not see fit in any way to subject them to the peculiar provisions which they had discovered to be necessary in the case of the carriers of freight and passengers. But at that time the significance of such filing of rates and tariffs was fully understood by Congress. The importance and significance of regulations was equally well understood; so likewise was the significance and importance of classifications

which were well known in freight transportation, and Congress recognized it as equally important with respect to the classes of messages telegraph companies should deal with.

Knowing all these things, Congress evidently purposely refrained from requiring telegraph companies to adopt the stringent rules which had been laid down respecting filing tariffs or regulations with the Interstate Commerce Commission, or making provisions for filing them at offices of the telegraph companies, contenting itself with simply requiring that such reasonable regulations should be adopted for the public and that the rates should be adopted or initiated, as the phrase is, presuming that these would be entirely sufficient to secure for the public from the telegraph companies the equality of treatment in the transaction of the telegraph business which at that time obtained and has obtained until now, with respect to carriers of freight and passengers. This being so, we think that the language employed in the last case upon the subject respecting carriers of freight and passengers, *Louisville & Nashville Railroad Company against Maxwell*, (cited *ante*), has perfect application to the situation in this case.

Justice Hughes, speaking for the Court, says:

> "The scope and effect of the provisions of the statute as to filing tariffs (both in their present form and as they stood prior to the amendments of 1906) have been set forth in numerous decisions. *Gulf, Col. & Santa Fe Ry. vs. Hefley*, 158 U. S. 98; *Tex. & Pac. Ry. vs. Mugg*, 202 U. S. 242; *Tex. & Pac. Ry. vs. Abilene Cotton Oil Co.*, 204 U. S., 426, 445; *Armour Packing Co. vs. United States*, 209 U. S., 56, 81; *N. Y. C. & H. R. R. Co. vs. United States*, 212 U. S. 500, 504; *Chicago & Alton R. R. vs. Kirby*, 225 U. S. 155, 166; *Illinois Central R. R. vs. Henderson*

Co., 226 U. S. 441; *Kansas Southern Ry. Co. vs. Carl*, 227 U. S. 639, 653; *Pennsylvania R. R. vs. International Coal Co.*, 230 U. S. 184, 197; *Boston & Maine R. R. vs. Hooker*, 233 U. S. 97, 110-113; *George N. Pierce Co. vs. Wells, Fargo & Co.*, 236 U. S. 278, 284. In the *Muggs case, supra*, it appeared that a rate, less than the lawful scheduled rate, had been quoted to the shipper by the agent of the railroad. The shipper had relied upon the quoted rate in making his shipments and sales. But it was held that he was bound to pay the established rate and was not entitled to the delivery of the goods without such payment. This was upon the ground that it was beyond the power of the carrier to depart from the filed rates and that the erroneous quotation of the rate by its agent did not justify it in making a different charge from that which was lawfully applicable to the shipment. As was said in *Kansas Southern Ry. Co. vs. Carl, supra*: 'Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid.' It was 'the purpose of the act to have but one rate, open to all alike and from which there could be no departure.' "

In the case of the telegraph companies there was no requirement that these regulations should be set forth and presented on the message forms, and the fact that the message form was not used, as indicated by the Court in its charge, did not render those regulations inapplicable to the plaintiff with respect to the message delivered at their in-

stance to the telegraph company at Havre, but such regulations as applied to an unrepeated cable message attached the moment that message came within the jurisdiction of the United States by virtue of the authority vested in Congress and the statute which it had enacted in pursuance of that authority, and the regulations which the telegraph company had adopted under the authority of the statute.

In conclusion, we earnestly urge the Court to take notice of the great importance, not only to telegraph companies, but to the business public who use the telegraph, of having an authoritative determination of this question **one way or the other.** Unless and until this Court speaks inferior Courts, both State and Federal, are more likely to follow the conclusion reached by the Circuit Court of Appeals, and to hold that the telegraph company is liable or not in these cases accordingly as the message is not or is written on one of the usual blanks. While formerly the practice of telegraph companies in requiring that messages, before acceptance, be written on the usual blanks was very strictly enforced, it has in late years been greatly relaxed, because of the conviction that since the Act of 1910 the limitations of liability were available regardless of the form in which the message came to the telegraph company's office. This relaxation of the former strict rule has been of great practical convenience both to the companies and their patrons. Not only has it made it possible to accept large numbers of messages by telephone, but it has prevented the slight delays and annoyances which were incident to the old practice of compelling the sender, who had prepared his message on plain paper, to copy it or paste it on a sending blank.

If the Circuit Court of Appeals is wrong, the telegraph companies should not be subjected to the multitude of suits which will doubtless be brought in reliance on this opinion, as soon as that opinion is generally known. If the Circuit Court of Appeals is right, the telegraph companies should know it at once, in order that they may readjust their business to the changed conditions, and protect themselves in the only way in which protection is possible—by insisting on a strict observance of the rule that messages must be written on the regular blanks.

We submit that the liability of petitioner was restricted by the tariff limitations to the sum of Four Dollars and Sixty-five cents; that all of the assignments of error to the Court of Appeals were well taken; and that the writ of error should, therefore, have been maintained and the case have been remanded for a new trial; and we, therefore, pray that a writ of certiorari may be granted, and that thereafter the judgments of the District Court and of the Circuit Court of Appeals be reversed and the cause remanded for a new trial.

Respectfully submitted,

SPENCER, FENNER, GIDIERE & PHELPS,
RUSH TAGGART,
FRANCIS RAYMOND STARK,
JOSEPH L. EGAN,
Attorneys for Western Union Telegraph Company, Petitioner.

NOTICE OF APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 3506

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

versus

ESTEVE BROTHERS & COMPANY,

Defendant in Error.

The defendant in error is hereby notified that the plaintiff in error will on Friday the 24th day of August, 1920, upon its verified petition and a copy of the entire record in this cause, file with the Clerk of the Supreme Court of the United States in his office at the Capital in the City of Washington, D. C., a motion and a petition for a writ of certiorari and brief in support thereof, copies of which are herewith delivered to you.

SPENCER, FENNER, GIDIERE & PHELPS,
Attorneys for Plaintiff in Error.

The foregoing notice is hereby accepted, and delivery of a copy thereof and petition for writ of certiorari and brief in support of the petition are hereby acknowledged.

Hall, Monroe & Heman

Attorneys for Defendant in Error.

New Orleans, La. Aug. 4, 1920

SUPREME COURT OF THE UNITED STATES

TERM .....

WESTERN UNION TELEGRAPH COMPANY,

Petitioner,

versus

ESTEVE BROTHERS & COMPANY,

Respondent.

Comes now Western Union Telegraph Company, by Rush Taggart, its undersigned counsel, and moves this Honorable Court that it shall, by certiorari or other process directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Fifth District, require said Court to certify to this Court for its review and determination, a certain cause in said Court of Appeals lately pending, wherein your petitioner, Western Union Telegraph Company, was plaintiff in error, and respondent, Esteve Brothers was defendant in error, and to that end it now tenders herewith its petition and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

RUSH TAGGART,

Counsel.

FEB 28 1921
JAMES D. MAHER
CLERK

IN THE

UNITED STATES SUPREME COURT

October Term, 1920.

No. 481.

WESTERN UNION TELEGRAPH COMPANY,

Petitioner,

vs.

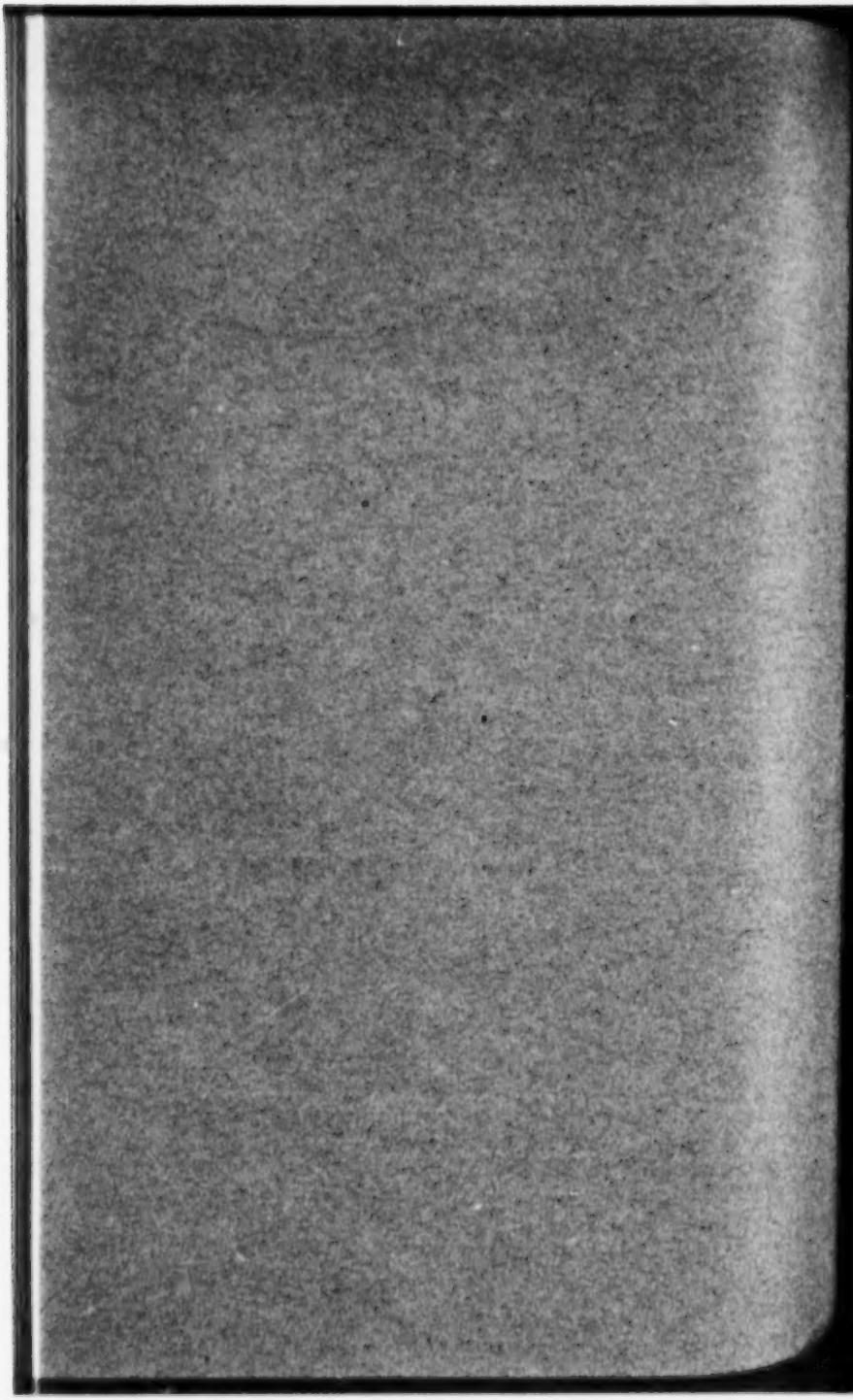
ESTEVE BROTHERS & COMPANY,

Respondents.

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION BY THE PETITIONER TO ADVANCE.

RUSH TAGGART,
FRANCIS RAYMOND STARK,
JOSEPH L. EGAN,
Attorneys for Western Union Telegraph Company.



UNITED STATES SUPREME COURT

October Term, 1920.

No. 491.

WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

vs.

ESTEVE BROTHERS & COMPANY,
Respondent.

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Motion by the Petitioner to Advance.

Comes now the petitioner, The Western Union Telegraph Company, and respectfully moves that the above-entitled cause, in which a writ of certiorari was granted on October 18, 1920, be advanced for early hearing during the current term of this court.

The vital question involved is this: Are the stipulations limiting liability for interstate and foreign telegrams, which have been duly established by telegraph companies in pursuance of

the permission granted by the Act to Regulate Commerce, and filed with and approved by the Interstate Commerce Commission, applicable to all telegrams alike, or only to such telegrams as are written on the ordinary message blanks in which these conditions are set forth? In other words, does the sender of the message who writes it on plain paper, or telephones it to the telegraph office, secure a higher measure of liability, in exchange for the same rate, than his competitor who writes a similar message on the usual sending blank?

The foregoing question, so far as the Western Union lines are concerned, has been raised in upwards of a hundred cases brought in various courts throughout the United States; and additional actions involving the same question are continuing to be brought from day to day. This question is now pending before appellate courts in Nebraska, Texas and Mississippi, and will shortly be before appellate courts in other states. By reason of the decision of the Circuit Court of Appeals in this case, which is the only reported decision on the question, inferior courts in the various states and the district courts of the United States, may, and Federal courts in particular are very likely to, reject the petitioner's contention and refuse to apply the limitations of liability on interstate messages, where the action is based on messages delivered to the petitioner over the telephone or written on plain paper.

The only other question which was raised in this case—namely, whether the stipultaions limiting liability, which are a part of the rates for interstate telegrams and foreign cables, apply to incoming cable messages (so far as their transmission

within the United States is concerned), has, we think, just been answered by the court in petitioner's favor, being necessarily involved in the decision in *Galveston, Houston & San Antonio R. R.* v. *Woodbury et al.*, U. S. , 41 Sup. Ct. Rep. 114.

Notice of this motion has been served on opposing counsel.

RUSH TAGGART,

FRANCIS RAYMOND STARK,

JOSEPH L. EGAN,

Attorneys for Western Union Telegraph Company, Petitioner.